U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANITA L. BLANKENSHIP and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Cleveland, OH

Docket No. 99-685; Submitted on the Record;
Issued September 8, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits on the grounds that she refused an offer of suitable work.

On September 2, 1995 appellant, then a 41-year-old mail processor, sustained a lumbar strain in the performance of duty.

In a form report dated February 8, 1997, Dr. Sheldon Kaffen, appellant's attending orthopedic surgeon, diagnosed a lumbar sprain and strain causally related to her 1995 employment injury. He indicated that appellant was totally disabled as of December 4, 1996 and requested that her claim be amended to include a herniated disc.

In a report dated July 8, 1997, Dr. Kaffen provided findings on examination and stated his opinion that appellant could perform light-duty work for four hours a day with restrictions which included walking no more than 1 hour a day, only occasional lifting of no more than 10 pounds a day, occasional kneeling and twisting and no bending, squatting or climbing.

On August 4, 1997 the employing establishment offered appellant a limited-duty job within the restrictions set forth by Dr. Kaffen.

Appellant accepted the job offer and returned to work on September 1, 1997 for four hours a day.

In a note dated October 1, 1997, Dr. Kaffen related that appellant attempted to return to work but worked only one week due to low back numbness and pain radiating into her lower extremity. He stated that appellant was totally disabled as of September 9, 1997.

In a report dated November 30, 1997, Dr. Kaffen provided findings on examination and related that appellant had decided to undergo surgery for her herniated disc as she was unable to perform her limited duties. He stated:

> "[Appellant] attempted to return to part-time duty with restrictions on [September 1, 1997]. However, due to the severity of her pain, was forced to stop after approximately [one] week. It is my opinion that her current disability is directly and causally related to the work injury of [September 2, 1995], which has been accepted for a lumbar strain/sprain and herniated disc at L5-S1. [Appellant's] condition worsened to the degree that she was forced to stop working entirely because of the delay in performing the surgery."

By letter dated February 11, 1998, the Office accepted that appellant had sustained a left-side herniated disc at L5-S1, noting that surgery had been recommended. The Office authorized payment of compensation benefits for disability through June 20, 1998 or the date she returned to work, whichever occurred first.

By letter dated April 2, 1998, the Office asked Dr. Jonathan Landsman, an orthopedic surgeon to whom appellant was referred by Dr. Kaffen in May 1997, to review a 4 hours per day modified clerk position for appellant which was a sedentary position sorting mail into a case and which included restrictions of lifting no more than 10 pounds, no bending or squatting, standing and walking as needed for personal comfort and no bending or squatting. Dr. Landsman signed the job description indicating that appellant was capable of performing the position.

By letters dated June 5 and 29, 1998, the Office offered appellant the modified clerk position approved by Dr. Landsman.

By letters dated June 26 and August 5, 1998, the Office asked Dr. Kaffen to provide his opinion as to appellant's work capabilities. There was no response from Dr. Kaffen.

By letter dated August 24, 1998, the Office advised appellant that it had found the modified clerk position offered by the employing establishment to be suitable to her work capabilities and that the position was currently available. She was advised that she had 30 days to either accept the position or provide an explanation for refusing it. Appellant was advised that if she refused or neglected to work after suitable work was offered, she would not be entitled to any further compensation benefits for wage loss. There was no response from appellant.

By decision dated September 25, 1998, the Office terminated appellant's compensation benefits on the grounds that she had refused an offer of suitable work.[1]

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits on the grounds that she refused an offer of suitable work.

[1] The record contains new evidence submitted subsequent to issuance of the Office's September 25, 1998 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[2] However, to justify such termination, the Office must show that the work offered was suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[4]

The evidence of record shows that appellant is capable of performing the modified clerk position offered by the employing establishment and determined to be suitable by the Office in its August 24, 1998 letter to appellant. The position involves sedentary work sorting mail. In determining that appellant was capable of performing the file clerk position, the Office properly relied on the opinion of Dr. Landsman, appellant's attending orthopedic surgeon. He reviewed the description of the modified clerk position offered by the employing establishment and determined that appellant was able to perform the position.[5] Despite Dr. Landsman's approval of the modified clerk position, appellant did not accept the position nor did she provide any reasons for her failure to accept the position. Therefore, the Office properly determined that she refused an offer of suitable work and was not entitled to any further compensation benefits.

[2] 5 U.S.C. § 8106(c)(2).

[3] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[4] *See Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[5] As noted above, Dr. Kaffen, appellant's other attending physician, was twice asked by the Office to comment on the suitability of the modified clerk position but did not respond.

The decision of the Office of Workers' Compensation Programs dated September 25, 1998 is affirmed.

Dated, Washington, DC
September 8, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member